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6 **UNITED STATES DISTRICT COURT**  
7 **CENTRAL DISTRICT OF CALIFORNIA**  
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9 ROSE ANN FERNANDEZ, ) NO. ED CV 12-0828 SJO (FMO)  
10 Petitioner, )  
11 v. )  
12 CA DEPT. OF CORRECTIONS, et al., ) **ORDER DISMISSING PETITION AND**  
13 Respondents. ) **DENYING A CERTIFICATE OF**  
14 ) **APPEALABILITY**  
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On May 23, 2012, Rose Ann Fernandez ("petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, attacking her conviction and sentence in People v. Fernandez, Riverside County Superior Court Case No. 200732660-3304224333 ("Fernandez I"). (Petition at 1-28).<sup>1</sup>

20 **DISCUSSION**  
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"The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are '*in custody* in violation of the Constitution or laws or treaties of the United States.'" Maleng v. Cook (Cook), 490 U.S. 488, 490, 109 S.Ct. 1923, 1925 (1989) (per curiam) (quoting 28 U.S.C. § 2241(c)(3); emphasis in original); see also 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). The "in

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<sup>1</sup> For ease of reference, the Court sequentially numbers the pages of the Petition, i.e., 1-28.

1 "custody" requirement is jurisdictional, and "requir[es] that the habeas petitioner be 'in custody'  
 2 under the conviction or sentence under attack at the time [her] petition is filed." Cook, 490 U.S.  
 3 at 490-91, 109 S.Ct. at 1925; Bailey v. Hill, 599 F.3d 976, 978-79 (9th Cir. 2010). This is because  
 4 the writ of habeas corpus functions primarily to secure immediate release from illegal physical  
 5 custody. Preiser v. Rodriguez, 411 U.S. 475, 484, 93 S.Ct. 1827, 1833 (1973); Carafas v.  
 6 LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 1560 (1968); see also Fay v. Noia, 372 U.S. 391,  
 7 430-31, 83 S.Ct. 822, 844 (1963), overruled on other grounds, Coleman v. Thompson, 501 U.S.  
 8 722, 111 S.Ct. 2546 (1991) (Habeas corpus "lies to enforce the right of personal liberty; when that  
 9 right is denied and a person confined, the federal court has the power to release him. Indeed, it  
 10 has no other power[.]").

11 Here, petitioner challenges court proceedings brought against her in Fernandez I. (See  
 12 Petition at 1-28). According to petitioner, on July 6, 2007, she was convicted of one count of  
 13 reckless driving in violation of California Vehicle Code ("Veh. C.") § 23103(a) (2007), her vehicle  
 14 was impounded for 30 days, and she was released. (Id. at 1 & 15). Based on these  
 15 circumstances, petitioner clearly is not in custody for this offense. See Veh. C. § 23103(c) (2007)  
 16 ("Persons convicted of the offense of reckless driving shall be punished by imprisonment in a  
 17 county jail for not less than five days nor more than 90 days or by a fine of not less than one  
 18 hundred forty-five dollars (\$145) nor more than one thousand dollars (\$1,000), or by both that fine  
 19 and imprisonment. . . ."). Indeed, petitioner is currently incarcerated on a different matter. (See  
 20 Petition at 15) (stating petitioner is currently incarcerated for a conviction incurred in a different  
 21 case); see also People v. Fernandez, 2011 WL 3925406, at \*1 (Cal. App. 4 Dist. 2011) ("In May  
 22 2010, defendant Rose Ann Fernandez entered a no contest plea to robbery and two counts of  
 23 assault with a deadly weapon other than a firearm arising from an incident during which she stole  
 24 her neighbor's necklace and hit her with a two-by-four board during an altercation. She also tried  
 25 to hit another neighbor boy with a two-by-four board. . . . Defendant was sentenced to the  
 26 agreed-upon sentence of four years in state prison."). As such, petitioner was not "in custody"  
 27 pursuant to Fernandez I at the time she filed the instant Petition. See Henry v. Lungren, 164 F.3d  
 28 1240, 1241 (9th Cir.), cert. denied, 528 U.S. 963 (1999) ("Henry was released before he filed the

1 petition that is before us. Because of this circumstance, there is no custody from which he could  
 2 be released.") (emphasis in original).

3 **CERTIFICATE OF APPEALABILITY**

4 A state prisoner seeking to appeal a district court's final order in a habeas corpus  
 5 proceeding must obtain a Certificate of Appealability ("COA") from the district judge or a circuit  
 6 judge. 28 U.S.C. § 2253(c)(1)(A). A COA may issue "only if the applicant has made a substantial  
 7 showing of the denial of a constitutional right." Id. at § 2253(c)(2); accord Williams v. Calderon,  
 8 83 F.3d 281, 286 (9th Cir.), cert. denied, 517 U.S. 1183 (1996). "A petitioner satisfies this  
 9 standard by demonstrating that jurists of reason could disagree with the district court's resolution  
 10 of his constitutional claims or that jurists could conclude the issues presented are adequate to  
 11 deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct.  
 12 1029, 1034 (2003); see also Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04  
 13 (2000).

14 When a district court dismisses a petition on procedural grounds, the reviewing court  
 15 should apply a two-step analysis, and a COA should issue if the petitioner can show both: (1)  
 16 "that jurists of reason would find it debatable whether the district court was correct in its procedural  
 17 ruling[;]" and (2) "that jurists of reason would find it debatable whether the petition states a valid  
 18 claim of the denial of a constitutional right[.]" Slack, 529 U.S. at 478, 120 S.Ct. at 1600-01.

19 The Court is dismissing the Petition without prejudice because petitioner is clearly not "in  
 20 custody" for purposes of establishing the Court's habeas jurisdiction. As such, petitioner cannot  
 21 make the requisite showing "that jurists of reason would find it debatable whether the district court  
 22 was correct in its procedural ruling." Slack, 529 U.S. at 478, 120 S.Ct. at 1600-01.

23 Based on the foregoing, **IT IS ORDERED THAT the Petition is dismissed without  
 24 prejudice and a Certificate of Appealability is denied.**

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 26 DATED: 6/1, 2012.

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 S. JAMES OTERO  
 UNITED STATES DISTRICT JUDGE